STATE OF MICHIGAN

COURT OF APPEALS

MARIBETH HASELEY,

Plaintiff-Appellant,

v

KELLY SERVICES, INC. and JAMES R. CONNER,

Defendant-Appellees,

and

CULLEN HANLON and JOHN DREW,

Defendants.

UNPUBLISHED
September 23, 2003

No. 235023
Oakland Circuit Court
LC No. 98-010-945-CZ

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff Maribeth Haseley appeals as of right from an order summarily dismissing under MCR 2.116(C)(10) her sexual harassment claims against defendants-appellees James R. Conner and Kelly Services, Inc. (Kelly). She also contests the trial court's denial of her motion to amend the complaint. We affirm.

I. Facts

In October 1996, plaintiff, a married woman, began working as a senior financial analyst in Kelly's worker's compensation department, located in Troy, Michigan. On April 30, 1997, plaintiff met Conner, a recent widower and the senior vice president and general manager of Kelly Staff Leasing (KSL), a wholly owned California subsidiary of Kelly, when she was sent to California to evaluate KSL's worker's compensation department. Plaintiff and Conner's relationship evolved after their initial meeting. Although plaintiff's initial trip to California only lasted two days, over the next few months Conner visited Michigan a number of times on business, and plaintiff returned to California once more to finish her worker's compensation project. On these trips, according to Conner, plaintiff consensually engaged in sexual relations with him a number of times, professed her love for him, and contemplated leaving her husband and marrying Conner. According to plaintiff, she initially resisted Conner's sexual advances but then acceded to a sexual relationship with him out of fear of losing her job.

In July 1997, an anonymous letter was sent to Kelly accusing Conner of sexual and professional impropriety.[1] Upon receipt of the letter, Kelly began an investigation and suspended Conner pending the outcome. Cullen Hanlon, the vice president of corporate security at Kelly, and John Drew, a human resources worker, conducted interviews with plaintiff about Conner. After admittedly lying to them about the nature of her relationship with Conner and denying that she and Conner had a sexual relationship, she later admitted that she and Conner were more than friends. Plaintiff testified that Hanlon and Drew "terrorized" her during these interviews, threatening to sexually assault her if she did not cooperate with them and demanding that she quit her job. Conner was terminated on August 18, 1997, as a result of the investigation, although not, evidently, because of his actions with plaintiff. After her last interview with Hanlon and Drew, on August 19, 1997, plaintiff obtained a medical leave of absence from her physician and did not return for several months. Kelly terminated plaintiff on April 23, 1998, for plaintiff's failure to substantiate her leave with medical documentation.

On December 1, 1998, plaintiff filed a complaint against Kelly, Conner, Hanlon, and Drew alleging quid pro quo sexual harassment and hostile work environment harassment in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., as well as intentional infliction of emotional distress.[2] The trial court granted summary disposition to all defendants on the CRA claims under MCR 2.116(C)(10) on February 8, 2000. Plaintiff then moved to amend her December 1, 1998, complaint on April 19, 2000, by adding assault and battery claims against Kelly and Conner. The trial court denied the motion to amend the complaint.

II. Standards of Review

We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. See, generally, *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party must initially support its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* at 455. "'The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.'" *Id*., quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the nonmoving party would bear the burden of proof at trial, that party may not merely rely on the allegations or denials in the pleadings but must set forth specific facts demonstrating the existence of a genuine issue of material fact. *Smith*, *supra* at 455. The trial court must view the affidavits and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 454. If the opposing party fails to establish the existence of a material factual dispute, summary disposition is appropriate. *Id.* at 455.

---

[1] The record indicates that plaintiff did not send the anonymous letter.

[2] The emotional distress claims were subsequently dismissed and are not at issue in this appeal.

The decision to grant or deny leave to amend a complaint is within a trial court's discretion, and this Court will not reverse the court's decision absent an abuse of that discretion. *In re F Yeager Bridge & Culvert Co*, 150 Mich App 386, 397; 389 NW2d 99 (1986).

III. Quid Pro Quo Sexual Harassment

Plaintiff argues that the trial court, in ruling on the quid pro quo sexual harassment claim, improperly made findings of fact by concluding that Conner did not have the authority to affect plaintiff's employment. Plaintiff contends that a factual issue existed regarding whether Conner exercised authority over her. We disagree.

To establish a claim of quid pro quo sexual harassment under the CRA, an employee is required to demonstrate by a preponderance of the evidence that she was subjected to unwelcome sexual conduct or communication and that "her employer or employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion v Nationwide Security Inc*, 450 Mich 702, 708-709; 545 NW2d 596 (1996). Quid pro quo harassment can only occur if "an individual is in a position to offer tangible job benefits in exchange for sexual favors, or, alternatively, threaten job injury for failure to submit." *Id.* at 713.

Plaintiff contends that Conner did have the requisite supervisory powers over her or that at least a question of fact existed with respect to the issue. Among other things, she points to her testimony that (1) she assumed that Conner was her supervisor on the worker's compensation project for KSL; (2) Conner was in her chain of command; (3) on her second night in California, and on other occasions after Conner's first trip to Michigan, Conner told her that he could have her fired with the "flick of a pen;" (4) she allowed Conner to take her clothes off and have sexual relations with her so that she would not get fired; (5) her direct supervisor, Michael Tilley, told her that her promotion depended on whether her work satisfied Conner; and (6) Conner was a senior vice president of Kelly. She also points to Tilly's deposition testimony in which he admitted that Conner was an officer of Kelly, as well as to testimony in which Conner himself purportedly admitted to being an officer of Kelly.

However, although plaintiff did testify as described, she also testified that she knew that she was supervised by Tilley, who reported to the executive vice president of administration, Robert Thompson, who reported to the president, Terry Adderly. Also, she at one point testified, concerning her interaction with Conner, that "I don't believe he should have been able to tell me when I said no that 'I'm going to call your boss and tell him that I can't work with you.'" This statement suggests that Conner himself did not have the authority to affect her job. Additionally, when asked why she believed that Conner was a vice president of Kelly Services, plaintiff stated, "His business card and the annual report lists him as such." However, the 1996 annual report lists Conner as the "Senior Vice President and General Manager" *of KSL*. We cannot conclude that the possible existence of a business card listing Conner as an officer of Kelly, combined with plaintiff's *assumption* that Conner supervised her work in California, is sufficient to create a genuine issue of material fact that Conner exercised supervisory authority over plaintiff such that he could affect the terms of her employment.

Moreover, Tilley testified that plaintiff did not report to Conner in any way, that Conner was not in plaintiff's chain of command, and that he had no influence over her promotions,

raises, or performance reviews. Tilley also stated that he was unsure whether Conner was a vice president of Kelly or only an officer of KSL. Furthermore, although Conner testified that he was a vice president of "Kelly Services," he subsequently stated that he held the vice president position at KSL, and, as noted, a 1996 annual report identifies him as the "Senior Vice President and General Manager" of KSL.

The available evidence, viewed as a whole, simply fails to create a genuine issue of material fact regarding whether Conner exercised the authority over plaintiff that is required for a successful quid pro quo sexual harassment claim. It indicates that he in fact did *not* exercise such authority, and the trial court, in stating as much, did not err or improperly make findings of fact. Conner was not in a supervisory position and could not exercise control over plaintiff's hiring, firing, or conditions of employment and thus was not in a position to offer tangible job benefits to plaintiff in exchange for sexual favors, or alternatively, to threaten job injury for failure to submit to sexual favors.

Plaintiff contends that even if Conner did not have any actual authority over her, Kelly is liable under the doctrine of apparent authority. Plaintiff, citing *McCalla v Ellis*, 180 Mich App 372, 380; 446 NW2d 904 (1989), contends that if a supervisor is acting within the apparent scope of the authority entrusted in him by the employer, then his conduct can fairly be imputed to the source of his authority. However, in *Burlington Industries Inc v Ellerth*, 524 US 742; 118 S Ct 2257, 2267-2268; 141 L Ed 2d 633 (1998),[3] a case cited by plaintiff herself on appeal, the Court stated that, in the rare instance where the plaintiff purports to have had a false impression that the alleged harasser was her supervisor, "the victim's mistaken conclusion must be a reasonable one." Under the circumstances of this case, especially considering that plaintiff effectively delineated her chain of command as being Tilley, Thompson, and Adderly, we conclude that any mistaken conclusion was unreasonable as a matter of law.

Because the trial court correctly concluded that Conner did not exercise the requisite authority over plaintiff, it properly dismissed the quid pro quo sexual harassment claim, and we need not address the other issues that plaintiff raises on appeal concerning the quid pro quo claim. We briefly note, however, that for a quid pro quo harassment claim to succeed, the sexual advances must have been unwelcome. *Champion*, *supra* at 708. Here, despite plaintiff's testimony that she did not want to have a sexual relationship with Conner and that she repeatedly refused his advances until he essentially browbeat her to submit, she also acknowledged repeated participation in sexual relations with Conner over a three to four month period, she admitted that she professed her love for Conner several times, and she admitted that she considered the possibility of marrying him. Plaintiff also admitted that she opened a safe deposit box with Conner, that she invited him to her house, and that she met him for a sexual rendezvous in Chicago. Thus, even though there is conflict within plaintiff's own testimony, we conclude that, when the evidence is considered in its totality, reasonable minds could not disagree that plaintiff actively participated in a consensual sexual relationship with Conner, and she has therefore not

---

[3] While Michigan courts are not *compelled* to follow federal precedent or guidelines on issues involving the Michigan CRA, federal precedent nonetheless is persuasive for guidance in reaching a decision involving the act. *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155(1992).

demonstrated "unwelcome" sexual advances. Accordingly, the trial court's dismissal of plaintiff's quid pro quo sexual harassment claim was proper on an additional, independent basis.[4]

IV. Hostile Work Environment Sexual Harassment

Plaintiff argues that the trial court erroneously concluded that Kelly had not been on notice of Conner's actions and therefore erroneously dismissed plaintiff's hostile work environment sexual harassment claim. We disagree.

To establish a prima facie case of hostile work environment sexual harassment, a plaintiff must demonstrate these five elements:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1992) (footnote omitted).]

An employer is liable for hostile environment sexual harassment only if it failed to investigate and take prompt, appropriate remedial action after having been put on notice of the harassment. *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000). In *Chambers*, our Supreme Court emphasized that "the relevant inquiry concerning the adequacy of the employer's remedial action is whether the action reasonably served to prevent future harassment of the plaintiff." *Id.* at 319. An employer cannot be held liable for a hostile work environment unless it received actual or constructive notice of the harassing conduct. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). Notice is considered adequate if, under the totality of the circumstances and viewing the circumstances objectively, a reasonable employer would have known there was a substantial probability that an employee was being sexually harassed. *Id.* at 622.

---

[4] We cannot agree with the concurring opinion's analysis of the quid pro quo sexual harassment claim. The concurrence implies that quid pro quo harassment can occur only if the harassed person is removed from her position, fails to receive a promotion, or suffers some other quantifiable employment action, such as a change in benefits, as a result of the harassment. We conclude, however, that a situation in which a subordinate is forced to submit to sexual advances in order to keep her job would be sufficient to establish the change in working conditions necessary for a quid pro quo sexual harassment claim. See, e.g., *Jin v Metropolitan Life Ins Co*, 310 F3d 84, 93-95 (CA 2, 2002). Here, plaintiff testified that she allowed Conner to take her clothes off and have sexual relations with her so that she would not get fired. If plaintiff's claim were otherwise viable, this testimony would cause plaintiff's claim to fall within the framework of quid pro quo harassment as described in *Jin*.

Plaintiff cites various deposition testimony in arguing that she adequately complained to Kelly about the alleged sexual harassment before Kelly received the anonymous letter. However, these "complaints" were vague and unspecific, and when plaintiff was asked if she specifically complained to anyone about Conner's alleged sexual harassment after returning from her first trip to California, plaintiff replied, "Not that I can think of, no." Moreover, plaintiff actually chose to lie when she had the opportunity to inform Kelly about Conner's conduct during the investigation prompted by the anonymous letter, and before she was interviewed, she even told Conner that she would lie for him. Thus, under an objective standard, the totality of the circumstances were not such that Tilley, or Kelly, would have or should have been aware, before Kelly received the anonymous letter, of a substantial probability that sexual harassment was occurring.

Plaintiff contends that notice was unnecessary in this case because Conner was an officer of Kelly. We disagree. Indeed, the evidence did not establish that Conner was an officer of Kelly as opposed to KSL. In *Sheridan, id.* at 622, the Court indicated that a plaintiff complaining of sexual harassment must have reported the harassment to "higher management" in order to establish respondeat superior. The Court defined higher management as "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Id.;* see also *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 475-476; 652 NW2d 503 (2002). Here, there were others in the company who ranked higher than Conner, but plaintiff did not complain to any of the higher managers, *Sheridan, supra* at 622, and there was no indication that Conner himself had the authority to effectuate change in the workplace. *Id.* at 476. The court correctly concluded that Kelly had not been on notice of the alleged harassment, and in so concluding, the court did not engage in improper fact-finding. The court also correctly concluded, again without making improper findings of fact, that once Kelly learned, by way of the anonymous letter, of possible sexual harassment committed by Conner, it took prompt remedial action. Indeed, after receiving the letter, Kelly immediately commenced an investigation, interviewing twenty-five employees who worked with Conner. Plaintiff was free to communicate her problems with Conner during this investigation. Conner was placed on suspension and removed from the workplace pending the outcome of the investigation. Once Kelly determined that Conner had behaved in an unprofessional and inappropriate manner, it terminated his employment.

Because plaintiff did not raise a genuine issue of material fact with regard to the element of respondeat superior, the trial court correctly dismissed the hostile work environment harassment case against Kelly. See *Radtke, supra* at 382-383. Moreover, plaintiff's suit was based on the CRA, which does not provide for individual liability under the present circumstances; the court thus correctly dismissed the case against Conner. *Jager, supra* at 485. Because the trial court correctly dismissed the hostile work environment case, we need not address any additional issues related to that theory of liability. We note, however, that plaintiff's claim also fails on additional grounds – namely, that the sexual conduct and communication, as a matter of law, were not "unwelcome," as discussed above in the context of the quid pro quo theory. See *Radtke, supra* at 382-383 (discussing elements of hostile work environment sexual harassment claims).

V. Amendment of Complaint

Finally, plaintiff argues that the trial court abused its discretion by denying plaintiff's motion to amend her complaint by adding claims of assault and battery against Conner and Kelly. She emphasizes that the court failed to specify a proper reason for denying the amendment. We disagree.

Under MCR 2.118(A)(2) a court shall freely grant leave to amend a pleading "when justice so requires." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). A trial court has broad discretion to deny a motion to amend a pleading for reasons such as the following: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). The trial court must provide a reason under *Fyke* to deny leave to amend, and the failure to provide such a reason constitutes an error requiring reversal, as long as the amendment would not be futile. *Dampier v Wayne Co*, 233 Mich App 714, 733-734; 592 NW2d 809 (1999). When a plaintiff merely seeks to restate or slightly elaborate on allegations already pleaded, the amendment is futile, and the trial court does not abuse its discretion by denying such a motion to amend. *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

No error requiring reversal occurred here. Indeed, contrary to plaintiff's contention on appeal, the court *did* specify an adequate reason for denying the amendment. It stated that "the facts under which this matter is brought before the Court today, are the same facts that were known at the time that the Court dismissed the action in regards to Mr. Conner. The Court is satisfied that he should remain out of this case." The court, by noting that plaintiff was simply raising the same facts in moving to amend that were known to her previously, implicitly recognized that the amendment (1) was unduly delayed and (2) would be futile.

Although delay alone is typically insufficient to justify denial of a motion to amend, in *Amburgey v Sauder*, 238 Mich App 228, 248-249; 605 NW2d 84 (1999), this Court held that because the plaintiff's proposed amendment would cause the defendant to defend a claim that arose from the identical facts on which the plaintiff's properly pleaded claim arose, the defendant would be prejudiced by allowing the issue as amended to be introduced after the dismissal of the case. In the present case, plaintiff's motion to amend her original complaint was submitted one and one-half months after the claims against Conner were completely dismissed, and it merely restates allegations used to support plaintiff's claims for sexual harassment. Thus, no abuse of discretion occurred with respect to the trial court's ruling.[5] *Id.*

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot

---

[5] Moreover, with respect to defendant Kelly, we conclude that plaintiff cannot establish the element of respondeat superior; the alleged assault and battery perpetrated by Conner did not occur "within the scope of the employee's employment." See *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989).